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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OFFICE OF THE CLERK

E.H. AND K.H. ON THEIR OWN BEHALF, AND AS PARENTS AND NEXT FRIENDS OF C.H., A MINOR, PETITIONERS

v.

BOARD OF EDUCATION OF THE SHENENDEHOWA CENTRAL SCHOOL DISTRICT; SHENENDEHOWA CENTRAL SCHOOL DISTRICT; KAREN BOIKO; WILLIAM CASEY; CHARLES HUFF; ERIKA RIEBEL; DR. ROBERT MCCLURE; AND MICHAEL SMITH

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

DENNIS P. DERRICK
Counsel of Record

7 Winthrop Street
Essex, MA 01929-1203
(978) 768-6610

CURRY & TAYLOR • 202-393-4141

QUESTIONS PRESENTED

1. Does the court of appeals' refusal to apply the 4-year statute of limitations provided by 28 U.S.C. § 1658(a)'s catch-all provisions to petitioners' claims undermine IDEA's enforcement scheme as Congress intended, deprive parents and affected children of the full force of IDEA's remedial provisions and run afoul of this Court's decision in *Jones v. R.R. Donnelly & Sons Co.*, 541 U.S. 369(2004)?

2. Does the decision below sabotage the rights of parents under IDEA and improperly subordinate to school officials important federal rights established by IDEA that parents of affected children be given timely, robust and full involvement in formulating for their child the most appropriate individual education plan consistent with his needs?

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The unpublished and unreported *per curiam* summary order of the United States Court of Appeals for the Second Circuit in *E.H. and K.H. et al. v. Board of Education of the Shenendehowa Central School District et al.*(C.A. No. 08-4857-CV), decided October 16, 2009, affirming the District Court's entry of summary judgment against petitioners on all of their claims under the Individuals with Disabilities Act (IDEA) for a free appropriate education for their son for the school years 2001-2002 through 2004-2005, is set forth in the Appendix hereto(App. 1-9).

The unpublished Decision and Order of the United States District Court for the Northern District of New York, in *E.H. and K.H. et al. v. Board of Education of the Shenendehowa Central School District et al.*(Civil Action Nos. 1:05-CV-972 and 1:06-CV-713), entered August 21, 2008, denying petitioners' motion for summary judgment and allowing respondents' cross motion for summary judgment on all of petitioners' claims under the Individuals with Disabilities Act (IDEA) for a free appropriate education for their son for the school years 2001-2002 through 2004-2005, is set forth in the Appendix hereto(App. 10-42).

JURISDICTION

The decision of the Second Circuit Court of Appeals affirming the District Court's entry of summary judgment against petitioners on all of their claims under the Individuals with Disabilities Act (IDEA) for a free appropriate education for their son for the school years 2001-2002 through 2004-2005, was

entered on October 16, 2009(App. 1). Petitioners filed no petition for rehearing or for rehearing *en banc*. This petition for writ of certiorari is filed within ninety (90) days of the date of the court of appeals' summary order affirming the District Court's Decision and Order denying petitioners' motion for summary judgment and allowing respondents' cross motion for summary judgment. 28 U.S.C. § 2101(c). Supreme Court Rule 13.3. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall...be deprived of life, liberty, or property, without due process of law....

United States Constitution, Amendment XIV, Section 1:

> ...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

20 U.S.C. § 1400(d)(1)(A) (Individuals with Disabilities Education Act) ("IDEA"):

> The purpose of this enactment is to insure that all children with disabilities have available to them a free appropriate education that emphasizes special education and related

services designed to meet their unique needs and prepare them for employment and independent living.

20 U.S.C. § 1415 (Individuals with Disabilities Education Act) ("IDEA"):

> (a) Establishment of Procedures. Any State educational agency, State agency, or local educational agency that receives assistance under this subchapter shall establish and maintain procedures in accordance with this section to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provisions of free appropriate public education by such agencies.
> (b) Types of procedures. The procedures required by this section shall include—
> (1) an opportunity for the parents of a child with a disability to examine all records relating to such child and to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;
> ....
> (3) written prior notice to the parents of the child whenever such agency—
> (A) proposes to initiate or change; or
> (B) refuses to initiate or change; the identification, evaluation, or educational placement of the child,in accordance with subsection (c) of this section; or the provision of a free appropriate public education of the child;

....

(5) an opportunity for mediation in accordance with subsection (e) of this section;

(6) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education of the child;

(7) procedures that require the parent of a child with a disability, or the attorney representing the child, to provide notice (which shall remain confidential)—

(A) to the State educational agency or local educational agency, as the case may be, by the complaint filed under paragraph (6); and

(B) that shall include—

(i) the name of the child, the address of the residence of the child, and the name of the school the child is attending;

(ii) a description of the nature of the problem of the child, relating to such proposed initiation or change, including facts relating to such problem; and

(iii) a proposed resolution of the problem to the extent known and available to the parents at the time; and

(8) procedures that require the State educational agency to develop a model form to assist parents in filing a complaint in accordance with paragraph (7).

....

(d) Procedural safeguards notice.

(1) In general. A copy of the procedural safeguards available to the parents of a child with a disability shall be given to the parents....

....

(2) Contents. The procedural safeguards shall include a full explanation of the procedural safeguards, written in the native language of the parents, unless it clearly is not feasible to do so,and written in an easily understandable manner, available under this section and under regulations promulgated by the Secretary relating to—

(A) independent educational evaluation;

(B) prior written notice;

(C) parental consent;

(D) access to educational records;

(E) opportunity to present complaints;

(F) the child's placement during pendency of due process proceedings;

(G) procedures for students who are subject to placement in an interim alternative educational setting;

(H) requirements for unilateral placement by parents of children in private schools at public expense;

(I) mediation;

(J) due process hearings, including requirements for disclosure of evaluation results and recommendations;

(K) State-level appeals (if applicable in that State);

(L) civil actions; and

(M) attorney's fees.

....

(f) Impartial due process hearing.

(1) In general. Whenever a complaint has been received under subsection (b)(6) or (k) of this section, the parents involved in such complaint

shall an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency, as determined by State law or by the State educational agency.

....

(g) Appeal. If the hearing required by subsection (f) of this section is conducted by a local educational agency, any party aggrieved by the finding and decision rendered in such a hearing may appeal such finding and decision to the State educational agency....

....

(i) Administrative procedures.

....

(2) Right to bring civil action.

(A) In general. Any party aggrieved by the findings and decision made under subsection (f) or (k) of this section...shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy.

....

(3) Jurisdiction of district courts.; attorney's fees.

(A) In general. The district courts of the United States shall have jurisdiction of actions brought under this section without regard to the amount in controversy....

28 U.S.C. § 1658(a):

Time limitations on the commencement of civil actions arising under Acts of Congress.

(a) Except as otherwise provided by law, a civil action arising under any Act of Congress enacted after the date of the enactment of this section [December 1, 1990], may not be commenced later than 4 years after the cause of action accrues.

Civil Rights Act–42 U.S.C. § 1983:

Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

Civil Rights Act–42 U.S.C. § 1988(a):

Applicability of statutory and common law.

The jurisdiction in civil and criminal matters conferred on the district courts...shall be exercised and enforced in conformity with the laws of the Untied States...; but in all cases where they are not adapted to the object..., the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not

inconsistent with the Constitution and laws of the United States, shall be extended and govern the said courts in the trial and disposition of the cause....

STATEMENT

In April of 2001, Dr. Deborah Kriss, a pediatrician and developmental specialist, examined petitioner C.H.("C.H." or "petitioner"), then five years old, before he was to enter kindergarten. Dr. Kriss found that C.H. was not toilet trained, met the criteria for Pervasive Development Disorder (PDD)/Asperger syndrome, possessed "quite impaired" social skills and exhibited "significant sensory integration issues." She recommended that C.H.'s parents, E.H. and K.H. ("the parents" or "petitioners"), pursue further evaluation of C.H. by their school district, respondent Shenendehowa Central School District ("respondent')(App. 11).

The parents did so and by June of 2001, respondent's psychologist conducted an evaluation which found that C.H.'s special education program would focus on his coping skills and cooperative social interactions(App. 11-12). She recommended a summer program for C.H. to develop these skills in aid of making an appropriate placement once school began(*Id.*). On July 18, 2001, she and respondent's Committee on Special Education (CSE) agreed in writing that C.H.'s management needs are high because of his PDD, requiring a " high degree of individualized attention"(App. 12).

His individual education plan (IEP) developed the same day by respondent noted C.H.'s "intensive

needs" and the "intensive instruction" he required because he was not yet toilet-trained, needed to wear a diaper and required "much redirection of attention and intervention to restrain [his] impulsive behaviors." Placement in a regular education classroom was deemed insufficient and his placement in the so-called BEARS program which has an intensive, coordinated educational program for students with his diagnosis "was considered best"(App. 12).

However, even though C.H. needed to improve his social functioning, there were no social goals articulated in this IEP. But an addendum to respondent's IEP, dated August 30, 2001, formulated a transition plan for C.H. which provided him with speech/ language services, group and individual counseling and a one-on-one teaching assistant 6.5 hours per day.

Yet after just five days in the BEARS program, respondent removed C.H. from the program because he functioned at a higher level than other students in the program(App. 12-13). Diagnosed with PDD/Asberger syndrome and within the autism spectrum yet still performing at an average intellectual level, C.H. proved to be an inappropriate candidate for the BEARS program(*Id.*). However, his placement in a six-student classroom compliant with 8 N.Y.C.R.R. 200.6(h)(4)(ii)(a) would have met his need for a high degree of individualized attention. At the very least, C.H.'s profile required his placement in an eight-student classroom in compliance with 8 N.Y. C.R.R. 200.6(h)(4)(ii)(b), which State educational regulation provides:

> The maximum class size for special classes containing students whose management needs

> are determined to be intensive, and requiring a significant degree of individualized attention and intervention, shall not exceed eight students, with one or more supplementary school personnel assigned to each class during periods of instruction.

The parents, exercising their rights under 20 U.S.C. § 1415 (Individuals with Disabilities Education Act) ("IDEA") to collaborate with respondent in fashioning an appropriate IEP for C.H., advocated for an IEP which accommodated C.H.'s need for individualized attention, a six-student classroom and the kinds of support services which respondent provided in the transition plan identified in its addendum of August 30, 2001, to its initial IEP. Instead, without considering the parents' input, respondent presented them with a IEP on October 1, 2001, already marked "final," which placed C.H. in its mainstream kindergarten classroom for the morning and a 12:1:1 self- contained language concepts classroom for the afternoon(App. 13).

Thus even though this "final" IEP acknowledged C.H.'s continuing need for "intensive guidance," his "highly variable" social functioning, his lack of toilet-training and the fact that he "becomes very upset when his mother is not present," respondent never prepared a transition plan for C.H.'s new kindergarten placement, contrary to the recommendations of its own psychologist. Furthermore, even though C.H. had not yet even begun this new placement, respondent's CSE had already characterized his participation in the afternoon language concepts class as "successful." This placement, contrary to the parents' suggestions,

eliminated special transportation, making the parents responsible for transporting C.H. to school(*Id.*).

As this mainstream placement of C.H. proved fundamentally wrong, respondent referred C.H. to Karner Intensive Development Services on October 18, 2001, to facilitate his transition(*Id.*). As events played out in the fall of 2001, C.H. never was able to transition to a full-day kindergarten program. Throughout the 2001-2002 school year, despite the parents transporting him and Karner's effort to facilitate the transition, C.H. was not attending his morning mainstream kindergarten class and was attending his 12:1:1 (12 students:1 teacher:1 aide) afternoon language concepts class for only two hours a day and for just two-three days per week(*Id.*).

In the face of C.H.'s complete failure to transition, respondent nonetheless continued its attempt to mainstream C.H. for the 2002-2003 school year. Respondent's CSE report of June 1, 2002, described C.H.'s first-year completely at odds with his actual kindergarten experience. It termed his social skills as "age appropriate," even while referring to his lack of toilet training and his severe anxiety while attending school(App. 14).

In order to provide more insight on C.H.'s placement, the parents sought out independent evaluations. The first, Dr. Christina Atkin, a pediatric psychiatrist, found C.H. had multiple disabilities (Asberger disorder, anxiety and hyperactivity disorder) and recommended a smaller class size with a dedicated aide for C.H. as well as a non-punitive teacher familiar with PDD, all consistent with New York State educational regulations which require that autistic students be provided with "a special education

teacher with a background in teaching students with autism" and that the school further provide "transitional support services in order to assure that the student's special education needs are being met"(8 N.Y.C.R.R. 200.13(a)(6))(*Id.*).

The second, an occupational therapy specialist, found C.H. to have significant deficits with a wide range of sensory processing and behavioral and emotional responses, requiring proactive management to meet his lack of toilet training, severe mood swings, low frustration levels, task avoidance, decreased attention and fidgeting. These issues, including riding the bus to school with other students, left him emotionally unprepared to begin or complete his school day, causing disruptions for the class and requiring significant one-on-one attention.

Once again, however, at a meeting on June 12, 2002, and again at a meeting on August 16, 2002, respondent's CSE, ignored these two independent evaluations and their recommendations, drafted its own "final" IEP for the 2002-2003 school year with no input from the parents, and presented the parents with this "final" IEP which once again mainstreamed C.H. to a regular first grade classroom with one hour per day in a 12:1:1 classroom, providing regular bus transportation (App. 14-15). C.H. was therefore placed in a regular education first grade classroom for all academics, homeroom, lunch etc. for five hours out of a six-hour school day(*Id.*).

Respondent's IEP for C.H.'s first grade in school left the parents justifiably concerned about this placement and their son's well being, given the "complete disaster" of kindergarten(App. 15). The parents without success requested another CSE

meeting to address their concerns about this IEP and then wrote to respondent on September 1, 2002, just before school was to start, continuing to advocate for a needed transition plan for their son, behavioral interventions and speech and language services as well as academic support. Respondent replied that it would consider C.H. a truant if he was not in school on September 5, 2002. The parents, faced with this wholly inappropriate placement at odds with C.H.'s best interest and welfare, decided to home school C.H. for the 2002-2003 school year(*Id.*).

While respondent did perform a neuropsychological evaluation of C.H. at the beginning of the 2002-2003 school year, one which recommended a smaller, consistent school setting for C.H. "with fewer transitions and more opportunities for independent functioning," there is no evidence that respondent ever incorporated these recommendations into its plan for C.H. Moreover, once the parents decided to home school C.H. in the fall of 2002, they obtained evaluations by C.H.'s pediatrician and a speech language pathologist. Both recommended that C.H. be provided a special teacher competent in autism on a 1:1 basis to help the parents as well as an occupational and speech therapist who could help home school C.H.(App. 15-16). The respondent never reviewed either of these recommendations or incorporated them into any plan for C.H.(App. 16).

On June 18, 2003, Dr. Christina Atkin, a psychiatrist who had evaluated C.H. in the summer of 2002, once again provided respondent with her recommendations for the 2003-2004 school year IEP. She believed that C.H. should be placed in a "6:1:2 class for high functioning PDD which is consistent and quiet

in its environment"(App. 16). She also called for C.H. to be taught coping skills, problem solving and self-help skills, with one-on-one instruction as needed(*Id.*). The parents further requested respondent's CSE to provide them information so that they could participate in C.H.'s IEP for the upcoming 2003-2004 school year.

Respondent refused to provide the parents with any information in advance of the CSE meeting of June 24, 2003, instead giving them only a blank form, indicating that respondent had reviewed none of the prior evaluations of C.H. which the parents had commissioned. The parents throughout the 2003 summer supplied respondent with the evaluations of Dr. Atkin and the aforementioned occupational therapy specialist, both of whom recommended a small classroom of no more than six children consistent with high functioning students on the autism spectrum together with a 1:1 aide trained in special education/Asberger syndrome.

Respondent reviewed and incorporated *none* of these recommendations into its IEP for the 2003-2004 school year. Instead, it offered the parents alternate programs for placement which supposedly provided a six-student classroom. However, the choices available were ones which met just C.H.'s management needs or just his academic needs, *not* both(App. 17). In fact, respondent made it clear to the parents that C.H. could not be placed in a school environment which met both of these objectives. Moreover, respondent failed to provide a final IEP for the 2003-2004 school year which responded to the parents' continuing requests for the development and implementation of functional behavioral assessments, behavioral intervention plans and adequate transition plans.

In September, 2003, the parents filed a complaint with the N.Y. Office of Vocational and Educational Services for Individuals with Disabilities (VESID) alleging violations of IDEA during the 2001-2002 and 2002-2003 school years(*Id.*). In the meantime, respondent's CSE developed an IEP for C.H. on October 22, 2003, which again provided for a 12:1:3 classroom placement for C.H. with sporadic occupational and speech/language therapy sessions and behavioral intervention consultations(App. 17-18). The parents found this IEP wholly inappropriate to C.H.'s needs (App. 18). On December 1, 2003, VESID found that C.H.'s IEP lacked measurable annual goals and in February of 2004, respondent's CSE met again to revise the IEP but it remained the same in its essential respects(App. 18).

On May 10, 2004, the parents requested an administrative due process hearing under IDEA because of respondent's failure to provide C.H. a free appropriate public education (FAPE) for the 2001-2002, 2002-2003 and 2003-2004 school years(App. 18-19). An independent hearing officer found that the parents' challenges to the 2001-2002 and 2002-2003 IEPs were barred by laches and that the 2003-2004 IEP provided C.H. a FAPE(*Id.*). After an administrative appeal affirmed this ruling based upon the one-year statute of limitations for the 2001-2002 and 2002-2003 school years, the parents appealed the decision to federal district court(***Civil Action No. 1:05-CV-972***)(App. 19).

In the meantime, in August of 2004, the parents once again proffered evaluations and recommendations from C.H.'s psychiatrist and occupational therapy specialist that C.H. continued to have intensive needs

and should be placed in a small supportive environment of less than ten students with needs similar to his own(*Id.*). Once again, however, respondent developed an IEP for C.H.'s 2004-2005 year which provided for a 12:1:2 third grade placement with a one-on-one aide and supplemental speech and occupational therapy sessions(App. 19-20). Services were to be provided at home until C.H. was successfully transitioned back to school with a teacher consultant present at his home for two hours a week(App. 20).

The parents agreed with some aspects of this IEP but concluded that it failed to provide C.H. with the 6:1:1 structured classroom with other high functioning students with autism or Asberger syndrome and, if the class contained students with other disabilities, a special education teacher especially trained to work with autistic children, all consistent with the applicable New York State regulations(*Id.*). In addition, the IEP was deficient in failing to provide C.H. with sufficient support at home while awaiting his transition to school(*Id.*). C.H. was provided with academic instruction for only two hours per week rather than the minimum of five hours required by New York State regulations; and his academic teacher lacked a background teaching students with autism.

In November of 2004, the parents provided respondent's CSE another evaluation by C.H.'s neuropsychologist who diagnosed him with high functioning autism and recommended once again that C.H. be placed in a small (6:1:1) structured classroom with other children with high functioning autism(App. 21). Respondent reviewed but did not incorporate this recommendation into a revised IEP. On January 8,

2005, the parents found this IEP for the 2004-2005 school year inappropriate and requested a second administrative due process hearing under IDEA because of respondent's failure to provide C.H. a free appropriate public education (FAPE) for the 2004-2005 school year(App. 22). Respondent developed a revised IEP on February 2, 2005, with the same classroom placement, one the parents again found inappropriate on February 21, 2009(*Id.*).

On October 31, 2005, the independent hearing officer found that respondent's 2004-2005 IEP provided C.H. a FAPE.(App. 22-23). The parents appealed and the administrative reviewing officer determined that the IEP was "reasonably calculated to provide C.H. with a FAPE and that there was no need to develop an independent functional behavior assessment for C.H.(App. 23). However, respondent's delay in conducting such assessment and in developing a transition plan for C.H. amounted to the denial of a FAPE in that it unduly extended C.H.'s temporary home placement thereby preventing him from the benefit of the IEP which was developed fo him(*Id.*). The case was accordingly remanded to respondent's CSE for a determination of additional compensatory services and to develop a transition plan(*Id.*). The parents appealed this decision to the federal district court(***Civil Action No. 1:06-CV-713***)(*Id.*).

These consolidated civil actions by the parents challenging respondent's failure to provide C.H. with a FAPE and claiming discrimination based upon his disability sought relief under IDEA, 20 U.S.C.§ 1400 *et seq.*; § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794; the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.*; and 42 U.S.C. § 1983. On August

21, 2008, upon cross motions for summary judgment on a record which reflected the facts recited herein, the United States District Court for the Northern District of New York, Sharpe, J., granted respondent's summary judgment motion and denied petitioners' cross motion for the same relief, reversing the administrative ruling to the extent that respondent had denied C.H. a FAPE for the 2004-2005 school year(App. 23-42).

Specifically, the district judge ruled that petitioners' challenge to respondent's failure to provide C.H. a FAPE for the 2001-2002 and 2002-2003 school years was barred by the one-year statute of limitations found in § 297(5) of the New York Human Rights Law since they did not request a due process hearing about these alleged failures until May 10, 2004(App. 26-28). In reaching this result, the district court determined that their cause of action for these school years accrued either on August 16, 2002, when they objected to the relevant IEPs) or on September 5, 2002, when they informed respondent that they were home schooling their son for the 2002-2003 school year(App. 28).

Addressing only respondent's IEPs for the 2003-2004 and 2004-2005 school years, the district judge concluded that it did not violate IDEA when it delayed developing an IEP for the start of the 2003-2004 school year, that its goals were sufficient and that its deficiencies in developing timely functional behavioral assessments, behavioral intervention plans and transition plans did not deprive C.H. of a FAPE for either the 2003-2004 or the 2004-2005 school year(App. 28-37).

Finding respondent's classroom placement appropriate for these school years because C.H. did not

need any smaller class than the 12:1:2 provided by the IEPs, the district court further ruled that petitioners did not have a valid claim under the ADA, § 504 of the Rehabilitation Act or § 1983(App. 37-39).

Upon petitioners' appeal, the court of appeals affirmed the district judge in a *per curiam* opinion (App. 1-9). Notably for the purposes of this petition, it ruled that the four-year statute of limitations provided by 28 U.S.C. § 1658(a)'s "catch-all" provisions does not apply to petitioners' claims under IDEA since the most closely analogous State statute of limitations (before IDEA was amended effective in 2005 to include its own two-year limitations period) was the one-year period set out in § 297(5) of the New York Human Rights Law(App. 3).

Nor did the court of appeals believe that respondent had failed to advise petitioners of the applicable one-year time period or that petitioners were misled about their rights in this regard by the notice respondent provided them about submitting a "written complaint" for any alleged violation (App. 3-4). As it ruled, "[w]hile not a model of clarity, the notice states that the normal limit is one year, and that the three-year limit applies only where 'compensation services' are at issue, which [petitioners] do not assert"(App. 4).

Finally, addressing a claim by the parents which the district court did not discuss in its opinion but which was contained in petitioners' complaint in the lower court, the court of appeals determined that the parents were not barred from full participation in the development of C.H.'s IEPs, as IDEA requires (App. 6-7). As it concluded,

> [t]he record reflects a robust, if acrimonious, *dialogue* between school personnel and [the parents], as well as [the parents'] participation in many meetings aimed at developing educational programming for C.H. Many of the incidents of which [the parents] complain occurred during the 2001-2002 and 2002-2003 school years, and are beyond the scope of our review. The remainder are insufficient to demonstrate the denial of the active role to which parents were entitled.

(App. 7)(emphasis supplied).

REASONS FOR GRANTING THE PETITION

1. The Court of Appeals' Refusal to Apply the Four-Year Limitations Period Provided by 28 U.S.C. § 1658(a)'s Catch-All Provisions To Petitioners' Claims Under IDEA Undermines The Enforcement Scheme Intended by Congress, Deprives Parents and Affected Children of the Full Force of IDEA's Remedial Provisions and Runs Afoul of This Court's Decision in *Jones v. R.R. Donnelly & Sons Co.*, 541 U.S. 369(2004).

In *Board of Education v. Rowley*, 458 U.S. 176(1982), this Court addressed for the first time IDEA's predecessor statute, The Education of the Handicapped Act, 20 U.S.C. § 1400 *et seq.*, enacted in 1975. Canvassing the Act's language describing the role of parents in helping to educate their children who had disabilities, it determined that the Act gave parents two principal rights: (1) the right to be notified by school officials of any proposed change in the

identification, evaluation, or educational placement of their child or the provision of a FAPE; and (2) the right to bring a complaint about "any matter relating to" their child's evaluation and education. *Id.* at 182-183 & n.6 citing 20 U.S.C. § 1415(b)(1)(D) and (E).

As the *Rowley* Court further observed in a footnote, the parents also had the right to "*be present* when the child's IEP is formulated" and to examine all of the pertinent records which provided the basis for the school officials' decisions relating to the identification, evaluation and educational placement of the child; and they could also obtain an independent evaluation of the child. *Id.* citing 20 U.S.C. §§ 1415(b)(1)(A);1412(4);1414(a)(4)(emphasis supplied). However, the Court appropriately noted that the primary responsibility for choosing the educational method best suited for the child "was left by the Act to state and local educational agencies in cooperation with the parents or guardians of the child." *Id.* at 207.

The Act's emphasis was on providing a "basic floor of opportunity" for children with disabilities by giving them access to specialized instruction and related services which are individually designed for the affected child rather than providing a framework for measuring the educational success of the handicapped child with respect to the school's general curriculum. *Id.* at 201. The Act was renamed IDEA in 1990 and in 1997, it was substantially modified to provide articulated goals in order to assess the affected child's progress in the school's general curriculum. 20 U.S.C. § 1414(d)(1)(A) (i)(I). Developmental delay was now specifically identified as a disability, *id.* at § 1401(3)(A)(I); and a statement of measurable goals,

including benchmarks or short-term objectives, meeting the child's needs, were now required. *Id.* at § 1414(d)(1)(A)(vii)(II).

The 1997 amendment to IDEA also gave parents new rights. They now had the right not only to be present when the child's IEP is formulated and reevaluated on an annual basis but also to provide meaningful "input" into the school's decisionmaking process in identifying "what additional data, if any, are needed to determine...whether any additions or modifications...are needed [in the child's IEP]...." *Id.* at § 1414(c)(1)(B)(iv). In addition, for the first time, the 1997 amendment gave parents the right to participate in the threshold determination of whether their child is one with a disability; and they were further entitled to be "members of any group that makes decisions on the educational placement of their child." *Id.* at §§ 1414(a)(4)(A) and 1414(f).

Thus instead of having the right merely to be present when their child's IEP was formulated, the 1997 amendment to IDEA dramatically expanded the parents' rights so that they could now participate fully with school officials in the formulation of their child's IEP on an ongoing basis and could have a meaningful, robust role in determining their child's educational placement. Moreover, the child himself was now entitled to a statement of measurable, articulated goals in order to assess his progress in the school's general curriculum over time; and he was further entitled to have positive behavioral interventions where his behavior impedes his learning.

With this statutory history as a predicate, this Court's decision in *Jones v. R.R. Donnelly & Sons Co.*, 541 U.S. 369(2004) is meaningful. In *Jones*, the Court unanimously held that the 4-year limitations period of 28 U.S.C. § 1658's "catch-all" provisions, a statute enacted in 1990 and intended to apply thereafter to all federal causes of actions arising under an Act of Congress where no limitations period was explicitly provided, would apply to a class action filed under 42 U.S.C. § 1981, a statute originally enacted in 1866 but amended by the Civil Rights Act of 1991. *Id.* at 382-383. As the Court in *Jones* reasoned, the petitioners there had alleged violations of the amended statute and their causes of action "arose under" the 1991 Act, not under § 1981 as originally enacted, and were thereby subject to the 4-year limitations period of § 1658(a)'s "catch-all" provisions. *Id.* at 382.

The crucial inquiry set out in *Jones* is whether the plaintiffs' claim against the defendant were created or made possible by the post-1990 enactment. *Id.* Because their claims (e.g., hostile work environment, wrongful termination etc.) were made possible by the 1991 amending Act, the 4-year limitations period of § 1658(a)'s "catch-all" provisions governed. *Id.* at 383.

Application of the *Jones* calculus should lead to the same result here. The 1997 amendment to IDEA dramatically expanded the parents' rights so that they could now participate fully with school officials in the formulation of their child's IEP on an ongoing basis and could have a meaningful, robust role in determining their child's educational placement. Moreover, the child himself was now entitled to a statement of measurable, articulated goals in order to assess his progress in the

school's general curriculum over time; and he was further entitled to have positive behavioral interventions where his behavior impedes his learning.

The reasoning in *Jones* makes clear that because IDEA was amended and revised in 1997 in order to give both parents and their affected children *new* rights and remedies in order to obtain a FAPE, § 1658(a)'s "catch-all" provisions apply to provide a 4-year limitations period for petitioners seeking to enforce IDEA's 1997 amended provisions. As the *Jones* Court wrote, this

> construction best serves Congress' intent in alleviating the uncertainty inherent in the practice of borrowing state statutes of limitations while at the same time protecting settled interests. It spares federal judges and litigants the need to identify the appropriate state statute of limitations to apply to new claims but leaves in place the "borrowed" limitations periods for pre-existing causes of action, with respect to which the difficult work already has been done.

Id. at 382.

Petitioners' claims against respondent under IDEA (which itself contained no limitations period until 2005) seeking redress for the denial of the parents' full participation in the formulation of their child's IEP for the 2001-2002 through 2003-2004 school years when they were completely shut out of the process and for the respondent's failure to provide C.H. with measurable goals in relation to the school's general

curriculum together with positive behavioral interventions during this time are directly bottomed on IDEA's 1997 amendments creating these new rights. § 1658(a)'s 4-year limitations period therefore applies to render timely petitioners' request for a due process hearing on May 10, 2004, making these claims.

Even if this Court determines that § 1658(a)'s 4-year limitations period does not apply in these circumstances, respondent ought to be equitably estopped from denying that the three-year limitations period contained in its Procedural Safeguards Notice to the parents applies to these proceedings, rendering timely petitioners' request for a due process hearing on May 10, 2004, which asserted claims based upon the 2001-2002 through 2003-2004 school years.

IDEA mandates that at several distinct phases of negotiations between the parents and school officials, respondent was required to provide the parents with this Notice. 20 U.S.C. §1415(d)(D)(2). The Notice must be detailed and *inter alia* must contain information about the right to a due process hearing. *Id.* The policy behind these detailed notice requirements is Congress' wish to eliminate the possibility that disabled children would lose their right to benefits or that parents would forfeit their role in their children's education because of ignorance of the Act and its procedural safeguards. See *C.M. ex rel. J.M. v. Bd. of Educ. Henderson County*, 241 F.3d 374, 381(4th Cir. 2001). Hence, Congress placed the onus on school authorities to inform parents adequately of their rights under IDEA.

Respondent's Notice failed in this fundamental regard(App. 3-4). Most important, in violation of 20

U.S.C. §1415(d)(D)(2), *it failed to make any mention of a due process hearing* and the statute of limitations for pursuing same; it only refers to the parents' right to submit "a written complaint" for an alleged violation of IDEA occurring not more than one year prior thereto "unless the violation is continuing," in which case the parents had three years file this written complaint.

The parents were understandably not represented by counsel at this time (which IDEA's rigorous Notice requirements assumed) and their reading of this incomplete and confusing Notice led them to believe that their claims about respondent's repeated conduct in shutting them out of the IEP process over time and in denying C.H. appropriate classroom placement as well as positive behavioral interventions from and after the 2001-2002 school year constituted "continuing" violations of IDEA for which they had three years to file their "written complaint." See *Murphy v. Timberlane Regional School Dist.*, 22 F.3d 1186, 1195(1st Cir. 1994)("continuing" violation of IDEA over a course of years).

Furthermore, they thought this three-year period for a continuing violation of IDEA applied to *both* a complaint and a request for a due process hearing. Indeed, they were unsure of the difference between these two remedies, believing one was the same as the other, and respondent's deceptive and incomplete Notice failed to clarify their rights in this regard. Thus respondent's Notice deceived the parents into believing that they had three years—*not* one—for requesting a due process hearing and for filing a complaint with the State Education Department

claiming that respondent had violated IDEA as well as State laws and regulations.

This fundamental misunderstanding by the parents about their procedural rights under IDEA was not a "garden variety claim of excusable neglect." *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96(1990). It was a denial by respondent of a critical procedural requirements mandated by IDEA resulting in the denial of a FAPE for C.H. *Rowley*, 458 U.S. at 206-207. Accord, *Amanda J. ex rel. Annette J. v. Clark County School*, 267 F.3d 877, 891-893(9th Cir. 2001); *Werner v. Clarkstown Central School Dist.*, 363 F. Supp.2d 656, 659(S.D.N.Y. 2005); *Reusch v. Fountain*, 872 F. Supp. 1421, 1429-1430(D.Md. 1994).

Before respondent can rely on the one-year limitations period to deny relief under IDEA, it has to show that the parents were clearly apprised of the limitations period in the first instance. IDEA itself provides that such notice to parents be written in "an easily understandable manner" and the Notice here violated IDEA's requirement under 20 U.S.C. §1415(d)(D)(2). Apart from § 1658(a)'s catch-all provisions providing a 4-year limitations period, this 3-year limitations period should apply to make timely the parents claims for the 2001-2002 through 2003-2004 school years, a period of time when the most egregious conduct by respondent took place.

With regard to the claimed failure of a party to bring an action in a timely manner as a result of the representations/conduct of the opposing party, this Court stated in *Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231, 232-233(1959) that "the maxim

that no man may take advantage of his own wrong...has frequently been employed to bar [an] inequitable reliance on [the] statute of limitations." *Id.* Under any analysis, the lower courts' unfair treatment of the limitations period in this case has deprived IDEA of much of its force, frustrating Congress' intent and denying both the parents and their son of their due process rights in the formulation of a IEP which is central to providing C.H. a FAPE.

After all, as a matter of due process, petitioners were entitled to notice of their rights under IDEA which was reasonably calculated, under all the circumstances, to apprise them of the time within which to assert them. *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 314(1950). The Notice was required to be of a kind which would reasonably and fairly convey to them the required information so that they could proceed effectively with their claims in whatever form was allowed. *Id. Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1,13-14(1978). The parents never received fair notice of how to assert their claims that respondent failed to adhere to its obligations under IDEA in developing a suitable IEP for C.H., denying him and his parents due process.

Moreover, the disparate treatment the parents and their son received here on account of the decisions of the lower courts on this issue of the limitations period, amounts to the kind of unfair and unequal treatment which bespeaks a denial of the equal protection of the laws under the fourteenth amendment to the federal constitution. *Allegheny Pittsburgh Coal v. Webster County*, 488 U.S. 336, 343-344 (1989). *Kahn v. Shevin*, 416 U.S.351, 355(1974). *Johnson v. Robison*,

415 U.S. 361, 374-375(1974). See *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 547(1983); *Carmichael v. Southern Coal Co.*, 301 U.S. 495, 509-510(1937). These fundamental notions of due process and equal protection are clearly implied—and, in fact, explicitly expressed—in IDEA's provisions and denying them relief on the their claims for the 2001-2002 and 2002-2003 school years deprives them of these rights.

2. The Decision Below Sabotages the Rights of Parents Under IDEA and Improperly Subordinates to School Officials Important Federal Rights Established by IDEA That Parents of Affected Children Be Given Timely, Robust and Full Involvement in Formulating For Their Child the Most Appropriate Individual Education Plan Consistent With His Needs.

It is clear from a reading of this Court's decisions in *Winkelman v. Parma City School Dist.*, 550 U.S. 516, 526-533(2007), *Schaffer v. Weast*, 546 U.S. 49, 52-55(2005), *Honig v. Doe*, 484 U.S.305, 311(1988), *Burlington School Comm. v. Mass. Dept. of Ed.*, 471 U.S. 359, 368-373(1985) and *Rowley*, 458 U.S. at 208-209, that parents are the most important advocates for their child in the IDEA dynamic and they are therefore given substantial procedural and substantive rights in formulating a timely IEP for their child.

By papering over respondent's serial denial of the parents' rights under IDEA as merely an "acrimonious dialogue" instead of a concerted effort by respondent to deny the parents the input they were entitled to under IDEA, the court of appeals has nullified the core principles of IDEA as conceived by

Congress and as construed upon implementation by the decisions of this Court. In turn, this is a fundamental denial of the child's right to a FAPE under IDEA and justifies the Court's grant of the petition in order to reassert the primacy of parental involvement in developing an IEP for their son thereby reasserting the best interests of the child in the process.

Parents are given an independent stake not only in the procedures and costs implicated by the IDEA process but also "in the substantive decisions to be made" in providing their child a FAPE, *Winkelman*, 550 U.S. at 531-533; they are entitled to play a "significant role" in the IEP process, *Schaffer*, 546 U.S. at 53; they are entitled to reimbursement for placement of their child in a school other than that provided for in the IEP, if justified under IDEA, *Burlington*, 471 U.S. at 369; and they are entitled to be the child's advocate in this process. *Rowley*, 458 U.S. at 208-209. Accordingly, procedural violations by school officials which interfere in the parents' active, robust and full participation in the IEP formulation process undermine the very essence of IDEA, "driv[ing] a stake into the very heart of the Act." *Amanda J. ex rel. Annette J. v. Clark County School*, 267 F.3d at 892-893 quoting *Town of Burlington v. Dept. of Educ.*, 736 F.2d 773, 783(1st Cir. 1984).

Yet respondent's conduct here, ratified by the court of appeals, has produced just this result. Besides respondent's procedural violations associated with its misleading and incomplete Notice to the parents, as identified in Part 1., *supra*, respondent's continuing conduct from the fall of 2001 through the 2004-2005 school year:

–presented the parents with successive "final" IEPs for C.H. without considering any of their input into its formulation, repeatedly subjecting the parents to IEPs which were a *fait accompli* for which they had no voice;

–ignored the successive recommendations of the parents' child professionals that C.H. be placed in a small (6:1:1) classroom with close one-on-one attention in order to manage his intensive needs;
–irresponsibly sought to mainstream C.H. into its regular curriculum when this course was indisputably inappropriate to his present needs;
–failed to prepare a transition plan for C.H. at any relevant time;
–repeatedly denied review and consideration of evaluations and reevaluations of C.H., some of which were commissioned by the parents themselves;
–refused to review the independent occupational therapy evaluation and refused to accommodate this report into C.H.'s subsequent IEPs;
–refused to review the independent neuropsychological evaluation and refused to accommodate this report into C.H.'s subsequent IEPs;
–refused to review the independent speech therapy and language evaluation and refused to accommodate this report into C.H.'s subsequent IEPs;
–repeatedly made revisions to C.H.'s IEPs without the parents' knowledge;
–denied the parents' participation in a January CSE meeting discussing any necessary behavioral interventions;

> –denied the parents equal participation in the formulation of a functional behavioral assessment completed in January of 2005; and
> – retaliated against the parents in an attempt to blunt or neutralize their advocacy for their son, again diminishing the crucial thrust of IDEA and its collaborative approach between parents and education personnel in developing a suitable IEP for affected children.

All of this conduct by respondent sabotaged the parents' rights under IDEA and improperly subordinated to respondent significant federal rights established by the Act which give parents of affected children timely, robust and full involvement in formulating for their child the most appropriate IEP consistent with his perceived needs. Ultimately, respondent's bad faith conduct forced the parents to home school their son in order to avoid further harm, harassment and retaliation against him and the parents for their attempt to advocate on his behalf for his due process rights.

Because all of the parents' claims have vitality, the parents possess viable remedies under the ADA (42 U.S.C. § 12101 *et seq.*) and 42 U.S.C. § 1983, and these claims, giving teeth to these violations of IDEA, should not have been dismissed.

CONCLUSION

For all of the reasons stated herein, a writ of certiorari should issue to review and vacate the judgment of the court of appeals and remand the matter to the district court for entry of summary

judgment on the merits of petitioners' claims including the appointment of an independent Special Master with knowledge of autism in order to oversee the development and implementation of C.H.'s special education needs and program; the provision of compensatory services to C.H. for the school years he was denied a FAPE; the reimbursement of the parents for the costs they incurred in providing educational services to C.H. while at home during those years; the award of attorney's fees and costs which the parents incurred; or provide petitioners with such other relief as is fair and just in the circumstances.

Respectfully submitted,

Dennis P. Derrick
Counsel of Record
7 Winthrop Street
Essex, MA 01929-1203
(978)768-6610

(any footnotes trail end of each document)
No. 08-4857-cv

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

E.H. and K.H. on their own behalf, and as parents and next friends of C.H., a minor, Plaintiffs-Appellants,

v.

BOARD OF EDUCATION OF THE SHENENDEHOWA CENTRAL SCHOOL DISTRICT; SHENENDEHOWA CENTRAL SCHOOL DISTRICT; KAREN BOIKO; WILLIAM CASEY; CHARLES HUFF; ERIKA RIEBEL; DR. ROBERT MCCLURE; and MICHAEL SMITH, Defendants-Appellees.

October 16, 2009, Decided

NOTICE: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

COUNSEL: APPEARING FOR APPELLANTS: FRED J. HUTCHINSON, Donohue, Sabo, Varley & Huttner, LLP, Albany, New York.

APPEARING FOR APPELLEES: EILEEN M. HAYNES, Bartlett, Pontiff, Stewart & Rhodes, P.C., Glens Falls, New York.

PRESENT: REENA RAGGI, DEBRA ANN LIVINGSTON, Circuit Judges, BRIAN M. COGAN,* District Judge.

SUMMARY ORDER

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment entered on August 21, 2008, is AFFIRMED.

Plaintiffs K .H. and E.H. appeal an award of summary judgment in favor of defendants (collectively, the "School District"), whom plaintiffs allege failed to provide their son C.H. with an appropriate public education and discriminated against him based on disability, violating the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.;* the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.;* Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794; and 42 U.S.C. § 1983. We assume familiarity with the facts and the record of prior proceedings, which we reference only as necessary to explain our decision.

1. *Timeliness*

Plaintiffs claim the district court erred in rejecting as untimely their IDEA claims based on the 2001-02 and 2002-03 school years. They do not dispute that those claims accrued no later than September 5, 2002, or that they commenced this action by requesting a due process hearing on May 10, 2004. Rather, they argue that the applicable time limit is not one year, as the district court concluded, but four years, under the federal "catch-all" statute, 28 U.S.C. § 1658(a). In the alternative, they assert that the School District failed

to advise them of their rights, so that a three-year limit applies. They also argue that the School District misled them as to the applicable limit, and is therefore estopped from arguing that their claims are untimely.

Because plaintiffs' argument urging application of 28 U.S.C. § 1658 was not raised below, we would generally treat it as waived. *See Baker v. Dorfman*, 239 F.3d 415, 420 (2d Cir. 2000). Even if plaintiffs could clear this procedural hurdle, however, their argument fails on the merits. As to claims arising before the IDEA was amended, effective July 2005, to include a two-year statute of limitations, "the applicable limitations period [is] determined with reference to the most appropriate or analogous state statute of limitations." *Somoza v. N.Y. City Dep't of Educ.*, 538 F.3d 106, 114 n.7 (2d Cir. 2008) (internal quotation marks omitted). We detect no error in the district court's affirmance of the State Review Officer's ("SRO") adoption of the one-year period specified in the New York Human Rights Law. *E.H. v. Bd. of Educ. of Shenendehowa Cent. Sch. Dist.*, Nos. 1:05-CV-972, 1:06-CV-713, 2008 U.S. Dist. LEXIS 64974, 2008 WL 3930028, *8 (N.D.N.Y. Aug. 21, 2008). Plaintiffs do not claim that another state law is more closely analogous.

Nor have plaintiffs shown that the School District failed to advise them of their rights or misled them as to the applicable time limit. Plaintiffs point to a Procedural Safeguards Notice prepared by the New York State Education Department and provided to them by the School District, which states as follows:

> You have the right to submit a written complaint . . . . The alleged violation must

> have occurred not more than one year prior to the date of the complaint:
>
> * unless the violation is continuing; or
>
> * the complaint is requesting compensation services. This only applies to alleged violations that occurred not more than three years prior to the date of the complaint.

Plaintiffs claim they alleged a continuing violation, and they read this notice to apply a three-year limit in such a case. We are not persuaded. While not a model of clarity, the notice states that the normal limit is one year, and that a three-year limit applies only where "compensation services" are at issue, which plaintiffs do not assert. We therefore affirm the holding of the district court that plaintiffs' claims based on the 2001-02 and 2002-03 school years are untimely.

2. ***Free Appropriate Public Education***

Plaintiffs contend that in 2003-04 and 2004-05, defendants denied C.H. the "free appropriate public education" ("FAPE") to which he is entitled under the IDEA. *See* 20 U.S.C. § 1400(d)(1)(A). We review *de novo* the district court's grant of summary judgment, *T.P. ex rel. S.P. v. Mamaroneck Union Free Sch. Dist.*, 554 F.3d 247, 252 (2d Cir. 2009), mindful that the IDEA offers no "invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review," and that courts "lack the specialized knowledge and experience necessary to resolve persistent and difficult questions of educational policy," *Board of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 208,

102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982) (internal quotation marks omitted); *accord Gagliardo v. Arlington Cent. Sch. Dist.*, 489 F.3d 105, 112-13 (2d Cir. 2007).

a. *Classroom Placement*

Plaintiffs contend the School District denied C.H. a FAPE by offering him classroom placements inappropriate to his needs. C.H.'s 2003-04 individualized education program ("IEP") provided for a 12:1:3 classroom, [1] and his 2004-05 IEP provided for a 12:1:2 classroom and a one-on-one aide. Plaintiffs contend that C.H. required a classroom limited to six students, or, at a maximum, eight, and that such a placement was mandatory under New York regulations, which cap class size at six for students with "highly intensive" needs "requiring a high degree of individualized attention and intervention," N.Y. Comp. Codes R. & Regs. tit. 8, § 200.6(h)(4)(ii)(a), and at eight for students with "intensive" needs, *id.* § 200.6(h)(4)(ii)(b). They cite recommendations for a six-student placement by a psychiatrist, C.H.'s pediatrician, and Dr. Alison Curley, a pediatric neuropsychologist.

Upon a thorough examination of the record, and exercising our "strictly limit[ed]" review, *D.F. ex rel. N.F. v. Ramapo Cent. Sch. Dist.*, 430 F.3d 595, 598 (2d Cir. 2005), we identify no error in the ruling of SRO Paul Kelly as to the 2003-04 placement. *Application of a Child with a Disability*, No. 04-110. SRO Kelly found that C.H.'s needs were not "highly intensive" for purposes of the regulations cited above. *Id.* at 10 (citing N.Y. Comp. Codes R. & Regs. tit. 8, § 200.6(g)). Notwithstanding the use of the phrase "intensive

needs" in an IEP prepared for C.H. on July 18, 2001, *see* Appellants' Br. at 10, we defer to SRO Kelly on this question requiring specialized knowledge, *see Board of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. at 208. We likewise defer to his conclusion, based on the testimony of an independent psychologist and on data regarding other students in the classroom to which defendants proposed to assign C.H., that the six-person classroom requested by plaintiffs would not have been the "least restrictive environment" the statute requires. *See Gagliardo v. Arlington Cent. Sch. Dist.*, 489 F.3d at 108.

Nor do we detect error in the ruling of SRO Joseph Frey as to the 2004-05 placement. *See Application of a Child with a Disability*, No. 05-128. Considering each element of C.H.'s IEP, and noting input from plaintiffs and the approval of clinicians familiar with C.H.'s needs, SRO Frey rejected the claim that C.H. required a 6:1:1 environment. *Id.* at 11-14. He acknowledged the view of Dr. Curley that a six-student classroom would be "best," but accurately observed that the IDEA does not require school districts to provide "the 'best' possible placement that can be imagined . . . so long as the district offers to provide an appropriate education, defined as one which allows the child to receive meaningful educational benefit." *Id.* at 14; *see Walczak v. Fla. Union Free Sch. Dist.*, 142 F.3d 119, 130 (2d Cir. 1998). Thus we affirm the district court's holding that the classroom placements proposed for C.H. in the 2003-04 and 2004-05 school years did not violate the IDEA.

b. *Parent Participation*

Plaintiffs claim defendants barred them from full participation in the development of C.H.'s IEPs, as the IDEA requires. [2] *See* 20 U.S.C. § 1415(b)(1). The record reflects a robust, if acrimonious, dialogue between school personnel and plaintiffs, as well as plaintiffs' participation in many meetings aimed at developing educational programming for C.H. Many of the incidents of which plaintiffs complain occurred during the 2001-02 and 2002-03 school years, and are beyond the scope of our review. The remainder are insufficient to demonstrate the denial of the active role to which plaintiffs were entitled. *See T.P. ex rel. S.P. v. Mamaroneck Union Free Sch. Dist.*, 554 F.3d at 253 (identifying no IDEA violation where parents "meaningfully participated" in development of IEP); *Cerra v. Pawling Cent. Sch. Dist.*, 427 F.3d 186, 193 (2d Cir. 2005) (identifying no violation where parents had "numerous opportunities to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (internal quotation marks omitted)). Thus we identify no error, much less one capable of denying C.H. a FAPE.

c. Behavioral Interventions

Plaintiffs claim defendants violated the IDEA by omitting behavioral programming from C.H.'s IEPs. We are unpersuaded. "The IDEA requires that, in developing an IEP for 'a child whose behavior impedes the child's learning,' the school district must 'consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior.'" *A.C. ex rel. M.C. v. Bd. of Educ. of Chappaqua Cent. Sch. Dist.*, 553 F.3d 165, 172 (2d Cir. 2009) (quoting 20 U.S.C. § 1414(d)(3)(B)(i)). Curiously, plaintiffs' main brief does not challenge the district

court's principal ruling on this issue: that SRO Frey erred in finding that defendants denied C.H. a FAPE when they failed to prepare a required functional behavioral assessment ("FBA"), behavioral intervention plan ("BIP"), or transition plan in a timely fashion. *See E.H. v. Bd. of Educ. of Shenendehowa Cent. Sch. Dist.*, 2008 U.S. Dist. LEXIS 64974, 2008 WL 3930028, at *11; *Application of a Child with a Disability*, No. 05-128, at 9-10. Plaintiffs raise the issue only in their reply brief. Thus it is waived. *See Norton v. Sam's Club*, 145 F.3d 114, 117 (2d Cir. 1998). What remains is the general claim that C.H.'s IEPs failed to address behaviors with the potential to impede his learning, *e.g.*, his inability to use the toilet, to tolerate change, or to participate in activities with his teacher. With respect to the three areas mentioned, however, as well as other related areas, the 2003-04 and 2004-05 IEPs address C.H.'s needs, techniques his teachers can employ, and skills he should acquire. Thus plaintiffs' general challenge is without merit.

3. *Other Claims*

Finally, plaintiffs fault the district court for dismissing their ADA, Rehabilitation Act, and § 1983 claims. Even if we were to conclude that the School District had violated the IDEA, such a violation, without more, would be insufficient to support a claim of disability-based discrimination under the ADA or Section 504 of the Rehabilitation Act. *See E.H. v. Bd. of Educ. of Shenendehowa Cent. Sch. Dist.*, 2008 U.S. Dist. LEXIS 64974, 2008 WL 3930028, at *14. To make out a *prima facie* case under either of these statutes, a plaintiff must show "(1) that [he] is a qualified individual with a disability; (2) that the defendants are subject to [the

relevant statute]; and (3) that [he] was denied the opportunity to participate in or benefit from defendants' services, programs, or activities, or was otherwise discriminated against by defendants, by reason of [his] disability." *Harris v. Mills*, 572 F.3d 66, 73-74 (2d Cir. 2009). Plaintiffs have adduced no evidence that would support an inference of such *prima facie* discrimination. Accordingly, we affirm the dismissal of plaintiffs' discrimination claims. As for plaintiffs' § 1983 claim, it lacks any factual basis other than the alleged discrimination, and is likewise dismissed.

We have reviewed plaintiffs' remaining arguments and find them to be without merit. Accordingly, the judgment of the district court is AFFIRMED.

Footnotes

* District Judge Brian M. Cogan of the United States District Court for the Eastern District of New York, sitting by designation.

1 This figure denotes the number of students (12), teachers (1), and aides (3).

2 Though not discussed in the district court's opinion, this allegation was included in plaintiffs' complaint. *See* Compl. Par. 119.

1:05-CV-972 (Lead),1:06-CV-713 (Member) (GLS)

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

E.H. and K.H. on their own behalf, and as parents and next friends of C.H., a minor, Plaintiffs,

v.

BOARD OF EDUCATION OF THE SHENENDEHOWA CENTRAL SCHOOL DISTRICT; SHENENDEHOWA CENTRAL SCHOOL DISTRICT; KAREN BOIKO; WILLIAM CASEY; CHARLES HUFF; ERIKA RIEBEL; DR. ROBERT MCCLURE, and MICHAEL SMITH, Defendants.

August 20, 2008, Decided
August 21, 2008, Filed

COUNSEL: FOR THE PLAINTIFFS: MARK B. MARTIN, ESQ., Office of Mark B. Martin, Baltimore, MD.

FOR THE DEFENDANTS: EILEEN M. HAYNES, ESQ., Bartlett, Pontiff Law Firm, Glens Falls, NY.

JUDGES: Gary L. Sharpe, U.S. District Judge.

OPINION BY: Gary L. Sharpe

OPINION

DECISION AND ORDER

I. Introduction

Plaintiffs EH and KH commenced these consolidated actions pursuant to the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 et seq.; § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794; the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 et seq.; and 42 U.S.C. § 1983 for violations of § 504 and the ADA, claiming that defendants failed to provide their son CH with an appropriate public education and discriminated against him based on his disability. The plaintiffs move for summary judgment on the IDEA claim, and the defendants move for summary judgment on all claims. For the reasons that follow defendants' motion is granted.

II. FACTS

A. 05-CV-972

1. Summer 2001

CH is a child with a disability under the IDEA. (¶l. SMF P 2, Dkt. No. 65:6.) EH and KH are his adoptive parents. *Id.* at ¶ 1. In April of 2001, when CH was five, he was diagnosed with Pervasive Developmental Disorder ("PDD") which is on the autistic spectrum. *Id.* at ¶ 12. He exhibited symptoms including hand flapping, difficulty expressing his needs, echolalia, [1] a dislike of loud noises and being touched, and impaired social skills. *Id.* at ¶¶ 13, 14.

KH referred CH to the Shenendehowa Committee on Special Education ("CSE") in April 2001. *Id.* at ¶¶ 16, 17. Throughout May and June, various evaluations of CH confirmed his PDD diagnosis and noted that he was still wearing diapers, exhibited self stimulatory behaviors, and had delays in fine motor skills and

sensory integration difficulties. *Id.* at ¶¶ 18, 22, 23, 24. Summer services were recommended, including coping skills, speech and language services, occupational therapy ("OT"), cooperative social interactions, and an assessment prior to confirming a 2001-02 placement. *Id.*

Subsequently, the CSE met on July 18th to develop an Individualized Education Program ("IEP") for the Summer. *Id.* at ¶¶ 25-27. The CSE identified CH as other health impaired based on his PDD diagnosis. *Id.* An IEP was developed that provided for academic instruction, speech and language therapy, OT, and recommended a placement at Arongen Elementary School. *Id.* at ¶¶ 25-28. KH gave her consent to the placement recommended by the CSE. *Id.* at ¶ 28. The parents contend that the School District (the "District" or "Shen") subsequently refused to provide summer services due to a staff shortage, which the District denies. *Id.* at PP 28-31.

2. 2001-02 School Year

A CSE meeting was held on August 30, 2001 to develop CH's IEP for the 2001-02 school year. *Id.* At ¶ 32. KH alleges that she was not allowed to discuss documents regarding proposed goals and parental concerns she had brought to the meeting, which is again contested. *Id.* at ¶¶ 32, 33. The 2001-02 IEP placed CH in an out of district 12:1:4 [2] BOCES placement known as BOCES BEARS. Among the services provided for were a one on one teaching aide, individual speech language therapy, individual and group OT and physical therapy and speech evaluations in the Fall of 2001. *Id.* at ¶¶ 34, 35. CH attended this placement for only five days before it became clear that he functioned at a higher

level than the other children and he was removed. (Def. SMF ¶ 3, Dkt. No. 58:14.)

Accordingly, the CSE reconvened on October 1st and developed an IEP which placed CH in a mainstream Kindergarten classroom for the morning and a 12:1:1 self contained language concepts classroom for the afternoon. *Id.* at ¶ 3. The parents again claim they were denied participation in this process. (Pl. SMF P 39, Dkt. No. 65:6.) The IEP noted that CH's primary areas of concern were in social interactions and social language skills. *Id.* It provided for a shared aide, slightly reduced individual and group OT and speech language therapy services, and an OT sensory diet consult. [3] *Id.* at ¶¶ 40-45. The physical therapy and speech evaluation provided for in the August IEP were also removed. *Id.* At ¶¶ 41-42. On October 18, 2001, the District referred CH to Karner Intensive Development Services ("KIDS") because of difficulties transitioning CH to school, but no functional behavioral assessment ("FBA"), behavioral intervention plan ("BIP"), or transition plan was recommended by the CSE. [4] *Id.* at ¶ 48. KH undertook the responsibility of transporting CH to school, as she was dissatisfied with the special transportation provided by the District. *Id.* At ¶ 52.

While teacher notes indicate CH made progress and mastered some OT objectives under the October IEP, he apparently had problems transitioning to school due to anxiety and he allegedly began exhibiting behavioral problems. *Id.* At ¶ 49. By the end of the 2001-02 school year, CH was not attending his morning placement and was, on average, attending his afternoon 12:1:1 placement 3 days a week. *Id.* At P 56.

3. Summer 2002

Throughout May and June of 2002, the District and CH's parents had a number of evaluations completed for CH. *Id.* at ¶ 63. A school psychologist and KIDS indicated that generally CH had successfully transitioned to school. *Id.* At ¶¶ 63-64. A private psychiatrist, Dr. Atkin, recommended, *inter alia*, a smaller placement for CH for the summer and 2002-03 school year, a non-punitive teacher knowledgeable in PDD and a social skills class. *Id.* at ¶ 68. KIDS recommended, *inter alia*, a very structured classroom for 2002-03, a behavioral specialist, a behavioral plan for toilet training and transitioning to school, a plan to deal with sensory issues and anxiety and visual schedules. *Id.* At ¶ 69.

For the summer, Shen offered CH a 10:1:2 placement with OT services twice a week. CH's parents rejected this as inappropriate and he received no services from Shen during the summer. *Id.* at ¶¶ 59, 61. Instead, his parents paid for him to have OT services three times a week from an independent provider during the summer. *Id.* At ¶ 67. CH would not attend school again.

4. 2002-03 School Year

On August 16, 2002, the CSE met to develop CH's IEP for the 2002-03 school year and changed his classification to autism. *Id.* at ¶ 70. The August IEP placed CH in a regular education first grade classroom, with an hour a day in a 12:1:2 classroom. *Id.* at P 70. It provided for either a shared or one-on-one aide, [5] 30 minutes of individual OT services twice a week, a 30 minute OT consult once a week and 30 minutes of group counseling once a week. The areas of counseling included behavior therapy, social skills, FBA and BIP.

Id. at P 71. Some of the previously mentioned recommendations of KIDS and Dr. Atkin were not included in the IEP. *Id.* at P 76, 77.

The parents did not agree to this IEP and indicated to the CSE that they felt they had been denied participation in its formulation. Id. at ¶¶ 79, 80. As such, another CSE meeting was scheduled for September 5th. (Def. SMF P 10, Dkt. No. 58:14.) The parents subsequently cancelled this meeting, indicated to the District that they had decided to home school CH and requested that his IEP services be pushed into the home. *Id.* Despite multiple requests, they failed to submit an Individualized Home Instruction Plan, necessary for the District to approve home schooling. *Id.* at P 83.

In September, CH was evaluated at public expense by neuropsychologist, Dr. Zuffante. *Id.* at ¶ 86. Testing revealed generally average academic abilities with weakness in nonverbal and executive functioning and anxiety in unpredictable social settings. (Def. SMF ¶¶ 11, 12, Dkt. No. 58:14.) A small placement was recommended with fewer transitions and specific behavioral and sensory therapies. *Id.* An independent speech language pathologist recommended speech therapy in a small group and a one-on-one aide, among other services. (Pl. SMF ¶ 87, Dkt. No. 65:6.) In a brief letter, CH's pediatrician, Dr. Buckley, recommended that the District should provide a special education teacher trained in the area of autism, OT, speech and language therapy and physical therapy in the home. *Id.* at ¶ 84.

Upon request for such services in the home, the District indicated it would provide a weekly sensory diet consult and OT twice a week for 30 minutes, as stated in the August 16, 2002 IEP, until they were provided the relevant evaluations. *Id.* at ¶ 90. CH received such OT services for a short time at the beginning of the 2002-2003 school year. *Id.* at ¶ 92. However, CH's parents postponed the services due to a dispute about the lack of OT goals in his IEP. *Id.* at ¶ 92. These services were not renewed as no agreement was reached. *Id.* at ¶ 94.

5. 2003-04 School Year

On June 18, 2003, Dr. Atkin wrote to the CSE informing it that CH had asperger's syndrome, ADHD and anxiety disorder. *Id.* at ¶ 102. She recommended a 6:1:2 class for high functioning PDD students and various services. *Id.* On June 24th a CSE meeting was held to discuss CH's IEP for 2003-004, which ended without consensus. *Id.* at ¶ 97. On July 14th, Dr. Buckley recommended that CH be placed in a six child classroom with 45 minutes of OT three times a week and 30 minutes of speech and language therapy three times a week. *Id.* at ¶ 101. On August 4th, the parents wrote to the District indicating interest in a 6:1:2 placement, and requesting specific home services. *Id.* at ¶¶ 103, 104. In response, the CSE wrote to the parents indicating that they had rejected numerous in and out of district placements discussed at the June 24th meeting, some of which were 6:1:2 classrooms. *Id.*

A CSE meeting was held on August 13th to again attempt development of CH's IEP for the 2003-04 school year. *Id.* at ¶ 105. It was recommended that home instruction continue until September 30th, while

the parents observed four classrooms with the school psychologist in the interim. (Def. SMF ¶ 17, Dkt. No. 58:14.) An interim home placement IEP was developed which provided for the following home services: three one hour OT sessions every two weeks, three one hour speech language therapy sessions every two weeks, and three behavioral intervention consultations a month. (Pl. SMF ¶ 105, Dkt. No. 65:6.) A CSE meeting was scheduled for October 2nd. (D1 Ex. 90.) [6] On August 15th, the District approved the services of Dr. Cosgrove, a behavioral psychologist, for the behavioral intervention consult. (D1 Ex. 91.)

On August 20th, the parents objected to the CSE's proposed placements and indicated their belief that the CSE had already rejected some of the placements as inappropriate. (Pl. SMF ¶ 108, Dkt. No. 65:6.) On August 22nd, the parents discontinued the behavioral intervention consult because they felt the school had misled Dr. Cosgrove about CH's needs. (Def. SMF ¶ 18, Dkt. No. 58:14.) On August 28th, the parents indicated they would not attend the October 2nd CSE meeting. (D1 Ex. 98.) They also informed the CSE that they were denying the occupational therapist and speech and language therapist access to CH due to inappropriate and missing goals and objectives in the August IEP. (Def. SMF ¶ 19, Dkt. No. 58:14.) In September, the parents filed a complaint with the NY Office of Vocational and Educational Services for Individuals with Disabilities ("VESID") alleging violations of the IDEA during the 2001-02 and 2002-03 school years. *Id.*

A CSE meeting was rescheduled for October 22nd, when a 2003-04 IEP was developed which provided for a 12:1:3 classroom. *Id.* at ¶ 21. Services included five 30 minute OT sessions every two weeks, five 30 minute

speech/language therapy sessions every two weeks, and three behavioral intervention consultations a month to help CH transition to school. *Id.* The IEP also provided program modifications including preferential seating, a sensory diet, extended time to complete tasks and simplified directions, transitions, activities, and assignments. *Id.* The parents rejected this IEP. On October 24th, CH was evaluated using WIAT-II testing, which revealed average reading skills and low average spelling and math skills. *Id.* at ¶ 22.

On December 1, 2003, VESID found that CH's IEP lacked specific measurable annual goals, but rejected or declined to address the remainder of the parents' objections. *Id.* At P 23. The CSE was required to reconvene and submit measurable annual goals to VESID for the 2003-04 school year by January 10, 2004, which it did. *Id.* At ¶ 24. On January 19th, the parents terminated the home speech/language therapist provided by the school because they found her behavior towards CH "inappropriate." *Id.* The District was unable to find another therapist due to staff shortages at various independent providers. *Id.* at ¶ 26. On February 6th, the CSE met again to revise CH's IEP, which remained essentially the same as the October 22nd IEP except for increases in the duration of OT and speech/language sessions. *Id.* at ¶ 25.

6. First Due Process Hearing

On May 10, 2004, the parents requested a due process hearing arising out of the District's alleged failure to provide CH a free, appropriate public education ("FAPE") for the 2001-02, 2002-03 and 2003-04 school years. *Id.* at ¶ 27. In a decision dated November 15, 2004, Independent Hearing Officer ("IHO") Freed

found, *inter alia*, that the parents' challenges to the 2001-02 and 2002-03 IEPs were barred by laches and that the 2003-04 IEP provided a FAPE. *Id.* at ¶ 28. The parents appealed to the Office of State Review. *Id.* State Review Officer ("SRO") Kelly, in essence, affirmed the decision of IHO Freed, finding that the parents challenges to the 2001-02 and 2002-03 IEPs were barred under a one year statute of limitations and that the 2003-04 IEP provided CH with a FAPE. *Id.* On August 3, 2005, the parents appealed SRO Kelly's decision to this court. *Id.*

B. 06-CV-713

1. 2004-05 School Year

On August 3, 2004, CH's parents submitted two letters to the CSE from Dr. Daly, a psychiatrist, recommending that CH be placed in a small supportive environment with minimal stimuli. *Id.* at ¶ 31. The CSE was also provided recommendations from CH's OT provider who recommended a one-on-one aide, a class of less than 10 children with needs similar to CH's and a quiet place for him to go when overwhelmed. *Id.*

On August 9th, the CSE met to draft CH's IEP for 2004-05, agreed to develop a BIP and transition plan, and then tabled the meeting in anticipation of an independent educational evaluation ("IEE") from CH's neuropsychologist, Dr. Curley. *Id.* at ¶ 31. It also agreed to allow the parents to work with the Speech and OT therapists on updating CH's performance levels. *Id.*

On August 19th, the CSE reconvened and created a 2004-05 IEP which provided for a 12:1:2, 3rd grade placement, and continued to classify CH as a child with autism. *Id.* at ¶ 33. The following services were

provided for: a one-on-one aide; three one-hour long individual OT sessions a week; an OT consultation for 30 minutes once a week; five one-hour long individual speech/language therapy sessions every two weeks; a behavior intervention consultation 3 times per month; and supplemental services including preferential seating, a sensory diet, simplified directions, activities, and assignments and use of assistive technology devices. *Id.* The IEP provided for measurable goals and objectives in math, reading, writing, speech/language, motor/occupational therapy and daily living skills. *Id.* It further described CH's needs and abilities in great detail. *Id.*

Services were to be provided at home until CH was successfully transitioned back to school. *Id.* Until such time, the IEP also provided for home teacher consultant services for two hours a week. *Id.* While CH's parents approved of aspects of this IEP, they ultimately disagreed with it and the 12:1:2 placement. *Id.* at ¶ 34. However, they acquiesced to behavioral consultations to develop a FBA, BIP and transition plan. *Id.* They also agreed to the provision of OT, speech and consultant teacher services in the home. *Id.*

Beginning in September of 2004, the District provided individual OT 3 times a week for an hour and individual speech therapy 5 times every two weeks for an hour at CH's home. *Id.* at ¶ 35. A home teacher was also provided for 2 hours per week starting in September. *Id.* However, the parents were unhappy with the quality and frequency of the home instruction, allegedly cancelled many of the sessions, and requested a different teacher and daily home instruction on multiple occasions. (D2 Ex. 24, 35.)

Though the behavioral consultant was supposed to meet with CH three times a month to develop an FBA, BIP and transition plan, he or his colleague met with CH only once on September 13, 2004 and then three times between November 9th and December 22nd. (Def. SMF ¶ 36, Dkt. No. 58:14.) On November 16, 2004, the parents provided the CSE with a copy of Dr. Curley's IEE. *Id.* at ¶ 38. The evaluation indicated that CH was improving in some areas, such as reading, and had generally unchanged academic achievement. *Id.* The evaluation further found no signs of anxiety. *Id.* However, it indicated that he was not making expected gains in spelling and math and was weak in socialization, executive functioning, communication and daily living skills. *Id.* The evaluation ultimately diagnosed CH with high functioning autism. *Id.* at ¶ 33. Recommendations were made, one of which was that CH be placed in a small (6:1:1) structured classroom with other children with high functioning autism, or, if no such placement existed, that he be home schooled. *Id.*

On December 14, 2004, the CSE reconvened to review Dr. Curley's IEE and check the development of the FBA. *Id.* at ¶ 39. While many of Dr. Curley's recommendations had already been incorporated into the August IEP, the CSE did increase CH's speech language services. *Id.* at ¶ 38. The behavioral consultants initial FBA was also completed on this date. (¶2 Ex. W.)

On December 16th and 17th, various school officials and service providers met with the behavioral consultants to discuss CH's behavioral and transition plan. (Def. SMF ¶ 39, Dkt. No. 58:14.) Subsequently, on or about January 4th, 2005, school officials met with CH's

parents to review the first draft of the FBA. *Id.* The next day the parents informed the school that they were rejecting the FBA and requested that an independent behavior consultant complete a new FBA. *Id.* On January 8th, they rejected the 2004-2005 IEP and requested a second administrative due process hearing. *Id.* On January 12, 2005, the CSE met to work on revising the goals and objectives in the December 2004 IEP. *Id.* at ¶ 40. The parents could not attend this meeting. *Id.* An attempt to hold a CSE meeting on January 19th was again unsuccessful because the parents were unable to attend. *Id.* Eventually, a meeting was held between the parents, the behavioral consultant and CH's service providers to discuss problems with the FBA. A revised FBA was completed on January 28, 2005. *Id.*

On February 2, 2005, the CSE again met to review CH's goals and objectives and finalize the IEP. *Id.* at ¶ 41. CH's IEP was revised to include a deadline for termination of all home services; new reading, writing and math goals and objectives; and a new section on social and emotional behavior with corresponding goals and objectives. *Id.* CH's parents rejected this revised IEP on February 21, 2005. *Id.* On February 24, 2005 a final FBA was submitted to the CSE by the Behavioral Consultant. (Pl. SMF ¶ 150, Dkt. No. 65:6)

2. Second Due Process Hearing

On March 15, 2005, IHO Turetsky found that CH's pendency placement was in the home, with the District providing OT 3 times a week for an hour, speech/language therapy 3 times a week for an hour and a home teacher consult for two hours a week. *Id.* at ¶ 154. On October 31, 2005, IHO Turetsky found that

the 2004-2005 IEP provided a FAPE. *Id.* at ¶ 156. He granted the parents request for an independent FBA and ordered the District to develop a BIP and transition plan for CH's transition back to school within 30 days of receipt of the FBA. Id. at ¶ 157. The parents appealed this decision. *Id.* at ¶ 159. SRO Joseph Frey determined that the 2004-05 IEP was reasonably calculated to provide CH with a FAPE and that there was no need for the development of an independent FBA. (Def. SMF ¶ 43, Dkt. No. 58:14.) However, he found that the District's delay in conducting the FBA and developing a transition plan amounted to the denial of a FAPE in that it unduly extended CH's temporary home placement, thus preventing him from the benefit of the IEP which was developed. *Id.* The case was accordingly remanded to the CSE for, *inter alia*, a determination of the necessity of additional compensatory services and to develop a transition plan. *Id.* The parents subsequently appealed the decision to this court as 06-CV-713. Id. at ¶ 44.

III. DISCUSSION

A. IDEA Actions

1. Standard of Review

The IDEA was enacted to ensure that disabled children are provided a FAPE. *See Frank G. v. Bd. of Educ. of Hyde Park*, 459 F.3d 356, 363 (2d Cir. 2006). "A free appropriate public education 'must include special education and related services tailored to meet the unique needs of a particular child, and be reasonably calculated to enable the child to receive educational benefits.'" *Id.* (citation omitted). It is important to note, however, that in providing an appropriate education,

schools are not required to maximize a student's potential. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 197 n.21, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982).

The creation of an IEP for each disabled student is central to the scheme set forth in the IDEA and New York's regulations under the Act. *Id.* An IEP must be "reasonably calculated to enable the child to receive educational benefits," which is to say it must be "likely to produce progress, not regression." *D.F. v. Ramapo Cent. Sch. Dist.*, 430 F.3d 595, 598 (2d Cir. 2005). If the guardian of the disabled child is unhappy with the IEP that has been developed, he or she may demand an impartial hearing before an impartial hearing officer, who makes a determination as to the appropriateness of the IEP. N.Y. EDUC. LAW § 4404(1)(a) (McKinney 2007). A further appeal is available to a SRO under § 4404(2). A New York Supreme Court or U.S. District Court may then review the decision of the SRO. 20 U.S.C. § 1415(i)(2)(B)

When a party moves for summary judgment in an IDEA action, the normal inquiry as to whether there are any disputed material facts does not apply. *See New Paltz Cent. Sch. Dist. v. St. Pierre*, 307 F. Supp. 2d 394, 397 (N.D.N.Y. 2004). Instead the inquiry is "whether the administrative record, together with any additional evidence, establishes that there has been compliance with [the] IDEA." *Id.* "The district court must engage in an independent review of the administrative record and make a determination based on a 'preponderance of the evidence.'" *Gagliardo v. Arlington Cent. Sch. Dist.*, 489 F.3d 105, 112 (2d Cir. 2007) (internal citation omitted).

To help guide courts in this review the Supreme Court has set out a two part test. "First, has the State complied with the procedures set forth in the Act? And second, is the [IEP] developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" *Rowley*, 458 U.S. at 206. For an IEP to be set aside on procedural grounds, there must be some evidence that procedural defects compromised the pupil's right to an appropriate education, seriously hampered the parents' opportunity to participate in the formulation process, or caused a deprivation of educational benefits. See 20 U.S.C. § 1415(f)(3)(E)(ii), *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 127 S. Ct. 1994, 2001, 167 L. Ed. 2d 904 (2007). The burden of proof in IDEA actions lies with the party challenging the IEP. See *Schaffer v. Weast*, 546 U.S. 49, 62, 126 S. Ct. 528, 163 L. Ed. 2d 387 (2005).

While engaging in this analysis, it is important to recognize that "courts lack the specialized knowledge and experience necessary to resolve persistent and difficult questions of educational policy." *Rowley*, 458 U.S. at 208. Thus, the Supreme Court has warned that judicial review of administrative decisions under the IDEA "is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review." *Id.* at 206. "IDEA's statutory scheme requires substantial deference to state administrative bodies on matters of educational policy." *Cerra v. Pawling Cent. School Dist.*, 427 F.3d 186, 191 (2d Cir. 2005). Accordingly, "[f]or a federal court to conduct an 'independent' review of a challenged IEP without 'impermissibly meddling in state educational methodology,' it must examine the record for any

'objective evidence' indicating whether the child is likely to make progress or regress under the proposed plan." *Walczak v. Fl. Union Free Sch. Dist.*, 142 F.3d 119, 130 (2d Cir. 1998) (citations omitted).

2. Challenges to 2001-02, 2002-03 Years; Statute of Limitations

Plaintiffs initially contend that IHO Freed and SRO Kelly erred in finding their challenges to the 2001-02 and 2002-03 school years time barred.

Prior to 2005, the IDEA and its implementing regulations did not contain a statute of limitations. [7] As such, the Second Circuit directed that the "most appropriate or analogous state statute of limitations," be applied to IDEA actions, running from the date the plaintiff knew or should have known of his injury. *See M.D. v. Southington Bd. of Educ.*, 334 F.3d 217, 221-22 (2d Cir. 2003) (quoting *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 660, 107 S. Ct. 2617, 96 L. Ed. 2d 572 (1987)); *Singleton v. City of N.Y.*, 632 F.2d 185, 191 (2d. Cir. 1980). Under this directive, SRO Kelly's decisions regularly found the New York Human Rights Law ("NYHRL") most analogous to the IDEA. Therefore he applied the one year statute of limitations found in § 297(5) of the NYHRL to administrative requests for due process hearings under the IDEA. *See, e.g., Application of a Child with a Disability*, Appeal No. 04-082; *Application of the Bd. of Educ. of the Wappingers Cent. Sch. Dist.*, Appeal No. 02-119. Accordingly, in the present instance, SRO Kelly found plaintiffs' challenge to CH's 2001-02 and 2002-03 IEPs time barred because a due process hearing was not requested until May of 2004. *See Application of a Child with a Disability*, Appeal No. 04-Case 110 at 10.

Plaintiffs argue that this was error, and contend that a three year statute of limitations should be applied to their challenges to these school years. However, the cases plaintiffs cite in support of this argument do not deal with the appropriate time period for requesting an administrative due process hearing, as is the issue here. Rather, with one exception, such cases deal with the applicable statute of limitations for the filing of a civil action under the IDEA. *See, e.g., Green v. City of New York*, 438 F. Supp. 2d 111, 124-25 (E.D.N.Y. 2006) (finding IDEA claim filed in court time barred under 3 year SOL when it accrued in 2000 and complaint was filed in 2005); *Butler v. South Glens Falls Cent. Sch. Dist.*, 106 F. Supp. 2d 414, 418-19 (N.D.N.Y. 2000) (discussing various time periods within which to file IDEA action in court). The exception, *Somoza v. N.Y. City Dept. of Educ.*, 475 F. Supp. 2d 373 (S.D.N.Y. 2007), did contemplate the application of a three year statute of limitations, among others, to a plaintiff's request for an administrative due process hearing. *Id.* at 384. However, the court ultimately skirted the issue by finding the plaintiff's administrative request timely under all potential time periods. *Id.* at 387. Thus, *Somoza* is inappropriate precedent to rely on for plaintiffs' argument that a three year statute of limitations is applicable to a request for a due process hearing.

Additionally, the cases plaintiffs cite apply a three year statute of limitations to the filing of an action only where the plaintiff either failed to exhaust his administrative remedies because he was not informed of his due process rights, or was not strictly appealing from an administrative decision. *See, e.g., Brooklyn Sch. for Special Children v. Crew*, No. 96 Civ. 5014, 1997

U.S. Dist. 12974, 1997 WL 539775, at *12 (S.D.N.Y. Aug. 28, 1997) (class action by schools for reimbursement from the State under the IDEA); *Robert D. v. Sobel*, 688 F. Supp. 861, 864 (S.D.N.Y. 1988) (action for attorney's fees incurred in IDEA administrative hearing). *See also Mason v. Schenectady City Sch. Dist.*, 879 F. Supp. 215, 218-20 (N.D.N.Y. 1993) (IDEA action where failure of district to advise plaintiffs of due process rights led to their failure to exhaust administrative remedies). Such is clearly not the case in the present instance.

Here, plaintiffs were informed as to how to assert their due process rights multiple times as early July 18, 2001. (*See, e.g.*, D1 Exs. 9; 15; 16; 20; 22; 27; 30; 34; 35.) They had objections to the relevant IEPs no later than August 16, 2002, and informed the District that they were home schooling their son for the 2002-03 school year on September 5, 2002. (D1 Ex. 61; 66.) Yet they failed to request an administrative due process hearing until May 10, 2004. (D1 Ex. 134.) Accordingly, the SRO properly applied a one year statute of limitations and found the plaintiffs' challenges to the 2001-02 and 2002-03 IEPs timed barred. [8]

3. Challenges to the 2003-04 and 2004-05 School Years [9]

Plaintiffs make four arguments in alleging that CH was denied a FAPE for the 2003-04 and 2004-05 school years: a) that the District failed to provide a final IEP for 2003-04 prior to the beginning of the school year in violation of 34 C.F.R. § 300.342(a); b) that the 2003-04 IEP lacked appropriate annual goals; c) that the 2003-

04 and 2004-05 IEPs were all fatally defective in that they failed to provide for, or timely implement, an FBA, BIP or transition plan for CH; and d) that the District's failure to place CH in a six or eight child classroom for the 2003-04 and 2004-05 school years deprived him of meaningful educational benefit. The court addresses each of these arguments in turn.

a) Failure to Provide a Final IEP at the Start of the 2003-04 School Year

The court first addresses plaintiffs' passing contention that the District's failure to have a final IEP with a recommended classroom placement for CH by the start of the 2003-04 school year was a "significant and fatal error." (See Dkt. No. 66 at 21-22.) This argument arises out of the fact that CH only had a temporary home placement IEP in place from August 13nd until October 22nd, when the CSE created a "final" IEP placing CH in a 12:1:3 classroom. (D1 Exs. 89; 105)

During the relevant period, 34 C.F.R. § 300.342(a), now recodified at § 300.323(a), provided that "[a]t the beginning of each school year, each [school district] shall have an IEP in effect for each child with a disability within its jurisdiction." However, the court does not believe that this regulation required that the District necessarily have a "final" IEP in place by the beginning of the school year, contrary to plaintiffs' contention. At the time, the official commentary to the IDEA regulations explicitly recognized the use of interim placements and IEPs in contemplation of the creation of a final placement and IEP. *See* 34 C.F.R. Part 300, Appendix A, Notice of Interpretation, Section IV, Question 14 (2004). *See also D.D. v. N.Y. City Bd. of Educ.*, 465 F.3d 503, 514 (2d Cir. 2006) (finding that

delay in the implementation of a final IEP may be acceptable under certain circumstances). Accordingly, in the court's view, § 300.342(a) was not violated *per se* so long as the District had a proper IEP, temporary or final, in place for CH at the beginning of the 2003-04 school year.

The interim August 13th IEP satisfied this requirement. Under this IEP the parties clearly contemplated that CH would remain in his prior home schooling placement, with the District providing push-in services through September, in order to allow the parents to evaluate various classrooms in anticipation of a final IEP and classroom placement. (D1 Exs. 89 at 1, 5; 90.) While it was perhaps desirable that a final IEP was completed sooner than October 22nd, the delay apparently occurred due to the parties' attempts to come to some agreement as to a placement, and was not so egregious as to deny CH a FAPE. [10] (D1 Ex. 93.) In any event, even when finalized, the 2003-04 IEPs were rejected by the parents. (See Pl. SMF 113, 119, Dkt. No. 65:6.) As such, any delay in developing them did not prejudice CH's education. *See Grim v. Rhinebeck Cent. Sch. Dist.*, 346 F.3d 377, 382, 74 Fed. Appx. 137 (2d Cir. 2003) (no denial of FAPE from delay in formulating and reviewing proper IEP where plaintiff would not have resorted to it anyway). Accordingly, the court rejects plaintiffs contention that the failure to offer a classroom placement and final IEP before October 22nd was a "fatal" defect.

b) Annual Goals

On December 1, 2003, VESID found that the annual goals in the October 22nd IEP were lacking because they were not sufficiently specific and measurable. (D1

Ex. 114 at 6.) As such, the court next addresses plaintiffs' brief objections related to these deficient goals and their impact. (See Dkt. No. 66 at 21.)

Annual goals are required by 20 U.S.C. § 1414(d)(1)(A)(i)(II). As such, in certain circumstances, their insufficiency can constitute the denial of a FAPE. In the current instance, however, any deficiency in such goals in the October 22nd IEP had, at most, only a *de minimis* effect. First, VESID required the District to remedy the deficiency in annual goals by January 10, 2004, which was done. (D1 Exs. 114 at 6; 118; 136.) As such, this defect in the IEP, which CH was not being educated under in any event, was quickly rectified.

Additionally, VESID found that the short term objectives and benchmarks in the October 22nd IEP "were sufficiently specific, measurable and provid[ed] the criteria and method of evaluation." (D1 Ex. 114 at 6.) The court must agree, as the IEP contained 41 precise objectives across 5 major subjects and skills. (D1 Ex. 105 at 7-10.) Accordingly, any defect in the annual goals can "be excused because the short-term educational objectives were measurable and sufficiently specific to enable the [CH's] teachers and the parents to understand the CSE's expectations, as well as what [CH] would be doing over the course of the school year." *W.S. v. Rye City Sch. Dist.*, 454 F. Supp. 2d 134, 144 (S.D.N.Y. 2006).

c) Failure to Develop or Timely Implement an FBA, BIP or Transition Plan

The court next addresses the effect of the District's failure to provide a FBA, BIP or transition plan for the 2003-04 school year, or timely implement such services for the 2004-05 school year.

Turning initially to the 2003-04 school year, plaintiffs contend that CH was unable to transition to school without an FBA, BIP or transition plan, such that the failure to provide these services denied him a FAPE. Setting aside the issue of a transition plan for a moment, the court notes that the plaintiffs have pointed to no evidence indicating that anyone involved in the formulation of the 2003-04 IEP, including the parents or their experts, sought or recommended an FBA or BIP for that year. (*See* Pl. SMF PP 96-120; Dkt. No. 65:6.) Additionally, while the 2003-04 IEPs did not explicitly provide for an FBA, BIP or transition plan, to the extent such services were desirable, the District provided for their substantial equivalent.

Numerous behavioral and sensory modifications and supports were provided for in the relevant IEPs. (D1 Ex. 105 at 2-3; P1 Ex. AAA at 3-4.) Most notably, the District hired Dr. Cosgrove, an expert in PDD and asperger's syndrome, as a behavioral consultant to observe CH at home, and work with the parents towards transitioning CH to school. It is clear from Dr. Cosgrove's testimony that the scope of her services would have encompassed many of CH's behavioral and social issues, which would otherwise have been addressed by a formal FBA or BIP. (D1 Exs. 91; 107; Tr1. at 166-74, 181-87.) However, the parents withdrew their consent to these services because they thought the District was misleading Dr. Cosgrove as to CH's needs and that CH's recommended placement was inappropriate. (D1 Exs. 94; 116 at 1.) By doing so, the parents effectively precluded any opportunity to develop a plan for transitioning CH to school, fault for which cannot be laid on the District.

The court must also disagree with SRO Frey's holding that the failure to timely create and implement the FBA, BIP and transition plan provided for in CH's 2004-05 IEPs denied him a FAPE by unduly delaying his access to the IEPs developed for that year. Delay in implementing an otherwise proper IEP or its component parts denies a child a FAPE only where the child is being educated under the plan, or would be but for the delay. *See Grim*, 346 F.3d at 381-82. However, where it is absolutely clear that the child would not be educated under the IEP, even if there was no delay in its formulation or implementation, there can be no denial of a FAPE. *Id.*

Such is the case here, as the record makes abundantly clear that so long as the relevant IEPs continued to provide a 12 student placement, the parents would not allow CH to be educated under them. (*See, e.g.*, Tr2. at 395-96, 910, 912, 957, 970.) Yet, even when the FBA was completed, it and CH's IEPs properly continued to find a 12 student placement appropriate. (D2 Exs. 37; 43 at 14; Tr2. at 100-101, 111-12, 164-65.) Thus, true to their word, the parents promptly rejected them. (D2 Ex. 23; Pl. SMF ¶¶ 151, 152, Dkt. No. 65:6.)

Accordingly, even had the assessments and plans at issue been completed before the school year began, CH would not have been afforded the benefit of the relevant IEPs. Therefore, the failure to timely implement an FBA, BIP and transition plan for the 2004-05 school year, as well as the failure to explicitly provide for such services during the 2003-04 school year, had no substantive impact on CH's education and did not deny him a FAPE.

d) Appropriateness of CH's Placement

Finally, the court addresses the propriety of CH's classroom placement. In this regard, plaintiffs primarily contend that CH was denied a FAPE because the District failed to provide him a 6 or 8 child classroom for the 2003-04 and 2005-06 school years. In support of this argument, they cite to the Eastern District Case of *A.T. v. New York State Educ. Dept.*, No. 98-CV-4166, 1998 U.S. Dist. 23275, 1998 WL 765371 (E.D.N.Y. Aug. 4, 1998), in which an SRO ordered that a student suffering from PDD and autism be provided a specifically constructed 6:1:1 classroom. Upon the school district's failure to implement this directive, the Eastern District entered a preliminary injunction enforcing the SRO's order. *Id.* In light of this case, and the various opinions provided to the District by the plaintiffs' experts indicating that CH should have been placed in a 6 child classroom, it is contended that the District's failure to do so for CH denied him a FAPE.

While the zeal exhibited by the SRO and the Eastern District in *A.T.* is admirable, the court does not feel it accurately reflects the mandate of the IDEA. Even if the court were to concede that a high functioning 6:1:1 classroom was the perfect placement for CH, the IDEA "guarantees ... an 'appropriate education, 'not one that provides everything that might be though desirable by loving parents.'" *Walczak v. Florida Union Free Sch. Dist.*, 142 F.3d 119, 132 (2d Cir. 1998) (internal citiation omitted). Districts "are not required to 'furnish[] ... every special service necessary to maximize each handicapped child's potential." *Grim*, 246 F.3d at 379 (quoting *Bd. of Education v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982)). Rather a school district is required only to provide an education reasonably calculated to promote more than trivial

progress in the least restrictive environment. *J.R. v. Bd. of Educ. of City of Rye Sch. Dist.*, 345 F. Supp. 2d 386, 393 (S.D.N.Y. 2004). In the court's view the District did so here.

For the 2003-04 school year, the District proposed a number of in district and out of district placements, some of which were six child classrooms. (D1 Exs. 88.) However, these placements were either full, or were rejected by the parents as being too far away, too large, or functioning at too low a level. (D1 Exs. 88; 93.) As such, the final IEPs for 2003-04 recommended CH's placement in a 12:1:3 classroom, which, it should be noted, had virtually the same student-to-staff ratio as the 6:1:2 plaintiffs repeatedly demanded. All the children in this classroom had similar needs to CH; requiring a small structured group setting and, with one exception, social skills training. (D1 Ex. 133.) They also functioned at CH's academic level. *Id.* Additionally, CH had shown some progress in his 12:1:1 placement during the 2001-02 school year, despite his poor attendance and utter lack of success in his mainstream placement. (D1. Exs. 32; 33; 47; 48.) As such, it was reasonable to believe he would be able to achieve academic success in a 12:1:3, especially given that the final IEPs for the 2003-04 school year provided for numerous program modifications and services to address CH's particular needs. (D1 Ex. 105 at 2-3; P1 Ex. AAA at 3-4.) These included: individual OT and speech language therapy; the previously mentioned behavioral consult by Dr. Cosgrove; preferential seating; a sensory diet; extended time to complete tasks; simplified directions, transitions, activities and assignments; refocusing and redirection; and various other supports. *Id.*

Finally, after a thorough review, all the administrative hearing officials found that a 6 student placement was improper for CH, as such placements are generally reserved for students with multiple disabilities or highly intensive management needs. *See* 8 N.Y.C.R.R. 200.6(h)(4)(ii)(a). In the absence of clear evidence to the contrary, the court declines to contradict this finding. *See Walczak*, 142 F.3d 119, 129 (2d Cir. 1998) (deference to administrative decisions on questions of educational policy is particularly appropriate where review has been thorough). The same applies to plaintiffs' *post hoc* argument that CH should have been placed in an eight child placement, as the court is not convinced by the record that CH's needs were sufficiently intensive to justify such a placement under 8 N.Y.C.R.R. 200.6(h)(4)(ii)(b).

In light of the above, the court must agree with the IHO and SRO below that the 12:1:3 placement and attendant services were reasonably calculated to provide CH with more than trivial educational advancement for the 2003-04 school year. Accordingly, such a placement was more appropriate for CH than the smaller placements the parents sought, as it complied with the IDEA's requirement that children be educated in the least restrictive environment that they can make meaningful progress in. *See* 20 U.S.C. § 1412(a)(5)(A). *See also* 8 N.Y.C.R.R. 200.13(a)(5) (directing that children with autism or asperger's syndrome should be mainstreamed where appropriate).

For much the same reasons, the court finds that the recommended 12:1:2 placement for the 2004-05 school year was entirely appropriate. On this issue, the court can add little to the excellent discussion by SRO Frey. *See Application of a Child with a Disability*, Appeal

No. 05-128 at 16-18. However, a few facts bear repeating. First, while the 2004-05 placement had one less staff member than the 2003-04 placement, the relevant IEPs provided CH with a one-on-one aide. (D2 Exs. 10; 37.) Further, the 12:1:2 placement actually consisted of only 10 children. (Tr2. at 29.) While a number of the parents' experts again indicated that a 6:1:1 placement would be best for CH, the independent behavioral consultants who developed the FBA for CH indicated that the larger placement was appropriate. (Tr2 at 100-01, 111-12, 164-65.) Finally, extensive services and program modifications were again authorized to ensure CH's educational success. (D2 Exs. 10; 37.) As such, and for the reasons articulated by SRO Frey, the court finds that 2004-05 placement and attendant services were reasonably calculated to enable CH to receive educational benefits in the least restrictive environment.

B. ADA, REHABILITATION ACT AND § 1983 CLAIMS

Having addressed plaintiffs' arguments under the IDEA, the court next turns its attention to plaintiffs' claims under Section 504 of the Rehabilitation Act and the ADA, as well as their § 1983 claim for the violation of these statutes.

Initially, the court notes that individuals cannot be held liable for violations of the ADA or Rehabilitation Act in their personal or official capacities. *See, e.g., Menes v. CUNY*, 92 F. Supp. 2d 294, 306 (S.D.N.Y. 2000) (citations omitted). Accordingly, such claims must be dismissed against defendants Boiko, Casey, Huff, Riebel, McClure and Smith.

Addressing these claims more generally, the ADA and Rehabilitation Act both require more than a mere violation of the IDEA to establish entitlement to relief. *Wenger v. Canastota Cent. Sch. Dist.*, No. 5:95-CV-1081FJSGJD, 2004 U.S. Dist. 5636, 2004 WL 726007, at *6 (N.D.N.Y. Apr. 5, 2004). At a minimum, bad faith or gross misjudgment as to CH's educational rights must be established to allow an inference of discrimination. *See, e.g., Butler*, 106 F. Supp. 2d at 420 (Section 504); *R.B. v. Bd. Of Educ. Of the City of N.Y.*, 99 F. Supp. 2d 411, 419 (S.D.N.Y. 2000) (ADA). However, in light of the above discussion, neither state of culpability is present here, and the ADA and Rehabilitation Act claims must be dismissed in their entirety. *See Wenger*, 2004 U.S. Dist. 5636, 2004 WL 726007, at *6-7.

Correspondingly, plaintiffs' § 1983 claim must be dismissed, as it is premised on the alleged violations of the ADA and Rehabilitation Act. Further, plaintiffs have failed to establish personal involvement in the alleged statutory violations by the individual defendants, or a discriminatory custom or policy by the municipal defendants. *See, e.g., Hawkins v. County of Oneida, N.Y.*, 497 F. Supp. 2d 362, 376-78 (N.D.N.Y. 2007) (recognizing that personal liability under § 1983 exists only if the defendant was personally involved in the discriminatory conduct); *J.F. v. Sch. Dist. of Philadelphia*, No. CIV. A. 98-1793, 2000 U.S. Dist. 4434, 2000 WL 361866, at *8 (E.D. Pa. Apr. 7, 2000) ("§ 1983 liability attaches to a municipality only when a municipal official, acting with the necessary policy-making authority and with deliberate indifference to the rights of individuals establishes or knows of and acquiesces in a policy, practice or custom which deprives individuals of constitutional or statutory

rights.") (citations omitted). These inadequacies provide an alternative basis for the dismissal of plaintiffs' § 1983 claims.

IV. Conclusion

In summary, the court finds: 1) that plaintiffs' challenges to the 2001-02 and 2002-03 school years are barred because an administrative due process hearing was not timely requested, 2) CH was not denied a FAPE for the 2003-04 or 2004-05 school years, and 3) plaintiffs have failed to establish a triable issue as to their Rehabilitation Act, ADA and § 1983 claims.

WHEREFORE, for the foregoing reasons, it is hereby

ORDERED that defendants' motion for summary judgment is **GRANTED** and plaintiffs' claims are dismissed in their entirety; and it is further

ORDERED that plaintiffs' motion for summary judgment is **DENIED**; and it is further

ORDERED that the decision of State Review Officer Frey is **REVERSED** to the extent it found defendants' delay in creating and implementing an FBA, BIP and transition plan denied CH a FAPE for the 2004-05 school year; and it is further

ORDERED that the Clerk of the Court shall enter judgment in favor of defendants and against plaintiffs; and it is further

ORDERED that the Clerk of the Court provide a copy of this Order to the parties.

IT IS SO ORDERED.

August 20, 2008

Albany, New York

/s/ Gary L. Sharpe

Gary L. Sharpe

U.S. District Judge

Footnotes

1 Echolalia is the repetition of certain phrases or statements.

2 This indicates 12 students, 1 teacher and 4 aides.

3 A sensory diet is a personalized activity schedule that plans and controls the sensory stimulus a child will be exposed to throughout the day.

4 A FBA is a process by which a student's problematic behaviors are observed to determine why the student is engaging in such behavior. A BIP is a concrete plan that is then developed to deal with deal with the problematic behavior.

5 The IEP is internally inconsistent as to the nature of the aide.

6 References to D1, ¶1 and Tr1 are to defendants' exhibits, plaintiffs' exhibits and the transcript in the first administrative hearing, respectively. References to evidence from the second administrative hearing are made in the same manner; D2, ¶2, Tr2.

7 The IDEA now provides that "a parent shall request an impartial due process hearing within 2 years of the

date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint." 20 U.S.C. § 1415(f)(3)(C). An appeal from a final decision of the agency must be brought in district court within "90 days from the date of the decision of the hearing officer." 20 U.S.C. § 1415(i)(2)(B).

8 While an argument could be made that the NYHRL's one year statute of limitations was not the most appropriate or analogous time period to apply to administrative due process requests under the IDEA, no briefing has been presented on this score, except as addressed above. As such, the court notes only that it adopts the reasoning set forth in *Application of the Bd. of Educ. of the Wappingers Cent. Sch. Dist.*, Appeal No. 02-119, in finding that SRO Kelly properly applied such a one year statute of limitations as the most appropriate and analogous time period here.

9 Plaintiffs' 2006 complaint also contains a paragraph which contends that the District denied CH a FAPE during the 2005-06 school year. However, they have presented no facts or argument for that school year in connection with the current motions. Nor have plaintiffs opposed the argument that they have failed to exhaust their administrative remedies as to that year. *See Polera v. Bd. of Educ.*, 288 F.3d 478, 487 (2d Cir. 2002). As such, the court deems the plaintiffs to have conceded that claims arising out of the 2005-06 school year are barred, and to have accordingly abandoned them.

10 There is also evidence in the record that the delay may have been necessitated by the parents inability to

attend an October 2nd CSE meeting to address CH's IEP. (D1 Ex. 98.)